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Sia Hiong Tee & Ors v Chong Su Kong & Ors

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-101–12 OF 2012(S)
ARIFIN ZAKARIA CHIEF JUSTICE, ABDULL HAMID EMBONG, AHMAD MAAROP, HASAN LAH AND MOHAMED APANDI FCJJ
6 APRIL 2015

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Land Law — Indefeasibility of title and interests — Land Ordinance (Sabah Cap 68)('SLO') — Appellants as bona fide purchasers for value without notice became registered owners of land belonging to respondents through use of void/invalid instrument of transfer — Whether s 88 of the SLO gave appellants immediate indefeasibility of title upon registration — Whether s 88 merely provided for registration of title without dealing with question of defeasibility or otherwise of title — Whether protection given to bona fide purchasers for value without notice in s 340(3) of the National Land Code ('NLC') not available under s 88 of the SLO — Whether common law rule of nemo dat quod non habet applied to deny appellants of good title as they had dealt with forger — Whether s 88 of SLO should be interpreted on its own without importing concepts of defeasibility or indefeasibility of title found in s 340 of the NLC

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The questions posed to the Federal Court in the instant appeal were (i) whether bona fide purchasers for value without notice obtained immediate indefeasible title upon registration of transfer of land in their names under s 88 of the Sabah Land Ordinance ('SLO') and (ii) whether s 88 could be interpreted to include the concept of deferred indefeasibility found in s 340 of the National Land Code ('NLC') which was the relevant law applicable in Peninsular Malaysia. Section 88 of the SLO stated that 'No new title and no dealing with, claim to or interest in, any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part'. The respondents were registered owners of a 25-acre plot of land in Kota Kinabalu. The seventh respondent ('Fook En'), who had custody of the title deed, handed the title deed to an interested buyer for the land for valuation purposes but the deed was never returned to him. It was later discovered that the appellants had become the registered owners of the land based on a sale and purchase agreement ('SPA') allegedly signed by Fook En on behalf of himself and the rest of the respondents pursuant to a power of attorney ('PA') the other respondents had allegedly given Fook En. The respondents maintained that their signatures in the SPA, the PA, the memorandum of transfer and other related documents were forged. The respondents filed suit in the High Court to, inter alia, set aside the transfer of the land to the appellants on the ground of forgery and to declare that they

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were still the registered owners thereof. The appellants' main defence was that they were bona fide purchasers for value without notice of the forgery. After a full trial, the High Court allowed the respondents' claim despite finding that the appellants were bona fide purchasers for value without notice. The court held that because the appellants had dealt with the forger in getting themselves registered as the legal owners of the land, their title was defeasible based on the concept of deferred indefeasibility. The Court of Appeal dismissed the appellants' appeal and while upholding the High Court's finding that the appellants did not acquire good title despite the fact they were bona fide purchasers for value without notice, it did not agree that the concept of deferred indefeasibility, found in s 340 of the NLC, applied to s 88 of the SLO.

Held, dismissing the appeal with cost and affirming the findings of the courts below:

(1) Section 88 of the SLO did not incorporate the concept of indefeasibility of title as found in s 340 of the NLC. Registration under the SLO did not confer indefeasibility of title whether deferred or immediate. Section 88 merely dealt with the registration of new title and dealings with, claim to or interest in, any land other than land held under native customary tenure without documentary title. It required such title or dealing, etc to be registered for it to be valid under the SLO. It did not deal with the issue of defeasibility or indefeasibility of title as contained in s 340 of the NLC. Section 88 had to be considered on its own without being unnecessarily influenced by the provisions of the NLC because they were poles apart. It was erroneous to interpret s 88 as conferring upon a bona fide purchaser for value without notice an indefeasible title or interest in land upon registration (see paras 29–31 & 37).

(2) In the absence of statutory intervention in the like of s 340(3) of the NLC, there was no protection under s 88 of the SLO afforded to bona fide purchasers for value without notice such as the appellants in the present case. The fact that the names of the appellants were on the register of title did not automatically confer on them indefeasible title. It was open to enquiry as to how they came to be registered as owners of the land. As the instrument of transfer used in the present case was invalid or void, as it was executed on the authority of a forged PA, it could not give rise to a valid title in law. The SLO could not give validity to such a title even though the appellants were bona fide purchasers for value without notice. Nothing in the SLO gave protection to such purchasers. Such statutory protection had to be expressly provided for (see paras 30–33).

(3) Applying the common law rule of *nemo dat quod non habet* (ie that no one can transfer what he has not got) to the present case, the forgers could not pass good title to the appellants. A mere claim of being a bona fide purchaser for value without notice was not sufficient to avoid the

application of the nemo dat rule which rendered the appellants' title, obtained under a void or invalid instrument of transfer, liable to be set aside at the instance of the respondents who were the rightful owners (see paras 34–36).

[Bahasa Malaysia summary

Soalan yang ditimbulkan kepada Mahkamah Persekutuan dalam rayuan ini adalah (i) sama ada pembeli bona fide dengan nilai tanpa notis memperolehi hakmilik tak boleh sangkal serta-merta selepas pendaftaran pindah milik tanah atas nama mereka di bawah s 88 Ordinan Tanah Sabah ('OTS') dan (ii) sama ada s 88 boleh diinterpretasikan termasuk konsep ketidakbolehan disangkal tertunda terdapat dalam s 340 Kanun Tanah Negara ('KTN') yang mana merupakan undang-undang relevan terpakai di Semenanjung Malaysia. Seksyen 88 OTS menyatakan bahawa 'No new title and no dealing with, claim to or interest in, any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part'. Responden adalah pemilik berdaftar 25 ekar plot tanah di Kota Kinabalu. Responden ketujuh (Fook En), yang mempunyai jagaan surat ikatan hakmilik, menyerahkan surat ikatan hakmilik kepada pembeli yang berminat kepada tanah untuk tujuan penilaian tetapi surat ikatan itu tidak pernah dikembalikan kepadanya. Ia kemudiannya didapati bahawa perayu telah menjadi pemilik berdaftar tanah berdasarkan perjanjian jualan belian ('PJB') yang dikatakan ditandatangai oleh Fook En bagi pihak dirinya dan kesemua responden berikutan surat kuasa wakil ('PA') yang dikatakan telah diberikan oleh responden yang lain kepada Fook En. Responden menyatakan bahawa tandatangan mereka di dalam PJB, PA dan memorandum pindah milik dan dokumen-dokumen lain yang berkaitan adalah dipalsukan. Responden memfailkan guaman ke Mahkamah Tinggi untuk, antara lain, mengetepikan pindah milik tanah terhadap perayu atas sebab pemalsuan dan untuk mendeklarasikan bahawa mereka masih merupakan pemilik berdaftar. Pembelaan utama perayu adalah mereka pembeli bona fide untuk nilai tanpa notis pemalsuan. Selepas perbicaraan penuh, Mahkamah Tinggi membenarkan tuntutan responden walaupun mendapati bahawa perayu adalah pembeli bona fide untuk nilai tanpa notis. Mahkamah memutuskan bahawa kerana perayu telah berurusan dengan pemalsu dalam mendaftarkan diri mereka sebagai pemilik sah tanah tersebut, hakmilik mereka adalah boleh sangkal berdasarkan konsep ketidakbolehan disangkal tertunda. Mahkamah Rayuan menolak rayuan perayu dan sementara menegakkan keputusan Mahkamah Tinggi bahawa perayu tidak memperolehi hak milik yang baik walaupun pada hakikatnya mereka adalah pembeli bona fide dengan nilai tanpa notis, ia tidak bersetuju bahawa konsep ketidakbolehsangkalan tertunda, yang terdapat di dalam s 340 KTN, terpakai kepada s 88 OTS.

Diputuskan, menolak rayuan dengan kos dan mengesahkan dapatan mahkamah bawahan:

(1) Seksyen 88 tidak memasukkan konsep hakmilik tak boleh sangkal seperti yang didapati dalam s 340 KTN. Pendaftaran di bawah OTS tidak memberi hakmilik tak boleh sangkal sama ada tertunda atau serta-merta. Seksyen 88 hanya berurusan dengan pendaftaran hakmilik baru dan urusan dengan, tuntutan atau kepentingan dalam, apa-apa tanah selain daripada tanah yang dipegang di bawah tempoh adat tanpa hakmilik dokumentari. Ia memerlukan hakmilik atau urusan itu, dan lain-lain untuk didaftarkan untuk ia menjadi sah di bawah OTS. Ia tidak berurusan dengan isu boleh hakmilik boleh sangkal atau tak boleh sangkal seperti yang terkandung dalam s 340 KTN. Seksyen 88 hendaklah dipertimbangkan dengan sendirinya tanpa perlu dipengaruhi oleh proviso KTN kerana meraka adalah jauh berbeza. Ia adalah kesilapan untuk menginterpretasikan s 88 sebagai pemberian kepada pembeli bona fide untuk nilai tanpa notis satu hakmilik tak boleh sangkal atau kepentingan atas tanah selepas pendaftaran (lihat perenggan 29–31 & 37).

(2) Dalam ketiadaan campur tangan statutori seperti s 340(3) KTN, tiada perlindungan di bawah s 88 OTS yang boleh diberikan kepada pembeli bona fide untuk nilai tanpa notis seperti perayu dalam kes ini. Fakta bahawa nama perayu berada atas hakmilik tidak secara automatik memberikan mereka hakmilik tak boleh sangkal. Ia terbuka untuk siasatan bagaimana mereka boleh menjadi pemilik berdaftar kepada tanah. Memandangkan instrumen pindah milik digunakan dalam kes ini adalah tak sah atau terbatal, kerana ia telah dilaksanakan atas bidang kuasa PA palsu, ia tidak boleh menimbulkan hakmilik sah dalam undang-undang. OTS tidak boleh memberikan keesahan kepada hakmilik sebegitu walaupun perayu adalah pembeli bona fide untuk nilai tanpa notis. Tiada apa di dalam OTS yang memberikan perlindungan kepada pembeli sebegitu. Perlindungan statutori seperti itu hendaklah diperuntukkan secara nyata (lihat perenggan 30–33).

(3) Mengguna pakai kaedah 'common law' *nemo dat quod non habet* (iaitu tiada orang yang boleh memindah milik apa yang dia tiada) kepada kes ini, pemalsu tidak boleh memberikan hakmilik yang baik kepada perayu. Satu tuntutan menjadi seorang pembeli bona fide untuk nilai tanpa notis tidak mencukupi untuk mengelakkan aplikasi kaedah *nemo dat quod non habet* yang mana memberikan hakmilik perayu, diperolehi di bawah satu instrumen pindah milik yang terbatal atau tidak sah, bertanggungan untuk diketepikan atas kehendak responden yang merupakan pemilik yang sah (lihat perenggan 34–36).]

Notes

For cases on indefeasibility of title and interests in general, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 3630–3796.

Cases referred to

Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Limited [1949] 1 KB 322, CA (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)
Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (refd)
Breskvar v Wall [1971] HCA 70; 126 CLR 376, HC (refd)
Frazer v Walker and Others [1967] 1 All ER 649, PC (refd)
Gibbs v Messer and others [1891] AC 248, PC (refd)
M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)
Ngui Yu Thau v Wong Mu Khyun & Ors [2003] MLJU 106; [2003] 6 CLJ 273, HC (distd)
Tan Sri William Cheng Heng Jem & Anor (suing as the President and Deputy President of the Associated Chinese Chambers of Commerce and Industry of Malaysia, and for and on its behalf) v Tan Sri Ngan Ching Wen & Ors [2013] 8 MLJ 417, HC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Legislation referred to

National Land Code ss 5, 92, 340, 340(1), (2), (2)(a), (b), (3)
Sabah Land Ordinance (Cap 68) s 88
Sale of Goods Act 1957 s 27(1)
Sarawak Land Code (Cap 81) s 31

Grace Chaw Hei Hei (Grace Chaw & Co) for the appellants.
Roland Cheng (Roland Cheng & Co) for the respondents.

Arifin Zakaria Chief Justice:

[1] This is an appeal by the appellants (the defendants in the High Court) against the decision of the Court of Appeal in affirming the decision of the High Court. The Court of Appeal ruled that the title of the appellants is defeasible on the basis that the power of attorney that was used as authority to transfer the said land to the appellants is a forged instrument even though the land in question had been registered in the name of the appellants. That being the case, the Court of Appeal held that the appellants could not have acquired a valid title to the land.

A LEAVE TO APPEAL

[2] This court had, on 5 December 2012, granted leave to the appellants to appeal against the decision of the Court of Appeal on the following questions of law:

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(a) Whether bona fide purchasers for value and without notice, obtained good title to land immediately upon registration of the transfer under s 88 of the Land Ordinance (Sabah Cap 68) ('Land Ordinance') and is therefore an indefeasible registered interest in Land?; and,

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(b) Whether the concept of deferred indefeasibility as adopted in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 which was a case based on s 340 of the National Land Code should be distinguished from the interpretation of s 88 of the Land Ordinance since there is no similar provision in the Land Ordinance?

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BACKGROUND FACTS

[3] The background facts of the case are these. The respondents (plaintiffs in the High Court) were the registered owners of a piece of land held under E CL015029213 measuring 25 acres located in the district of Menggatal, Kota Kinabalu (hereinafter referred to as 'the land'). The custody of the title deed of the land was with the second respondent (now deceased) until it was given to the seventh respondent allegedly for valuation purposes. It is not disputed that the seventh respondent had intended to sell the land and for that purpose he F informed one Tong Chung Hing (Tong) that he may be agreeable to a sale price of RM2.53m. Tong later informed the seventh respondent that a certain Mr Ling was interested to purchase the land for RM2.53m and is willing to pay in cash after Mr Ling had seen the original title and had valued the land. Upon the request of Tong, the seventh respondent gave the title deed to the land to Mr G Ling for valuation purposes but the title deed was never returned to the seventh respondent. It was discovered later that the appellants had become the registered owners by virtue of a sale and purchase agreement dated 19 March 2004 with the seventh respondent signing for himself and on behalf of the first to sixth respondents pursuant to a power of attorney which the first to sixth H respondents had allegedly given to the seventh respondent. The respondents contended that their signatures in the sale and purchase agreement dated 12 February 2004, the power of attorney dated 19 March 2004, the memorandum of transfer dated 25 March 2004 and Form PDS 15 were forged.

I PROCEEDINGS IN THE HIGH COURT

[4] In their claim, the respondents asked for, among others: an order that the transfer of the land effected under the Memorandum of Transfer dated 25 March 2004 to the first to fourth appellants be set aside and annulled on the

ground of forgery; an order directing the fifth defendant (the Assistant Collector of Land Revenue, Kota Kinabalu) to expunge from the register and records at the Central Land Office the registration of the transfer dated 25 March 2004 and any other dealings effected by the first to fourth appellants after 25 March 2004; and, a declaration that the respondents are the registered co-owner of the land on 25 March 2004.

[5] In opposing the claim, the appellants averred that they were not aware of any forgery in relation to the transfer of the land effected under the memorandum of transfer dated 25 March 2004 and claimed that they were bona fide purchasers for value without notice. The appellants also filed a claim against the third party ie a legal firm named Messrs Johari & Zelika, for negligence in handling the sale and purchase of the land.

[6] After a full trial, the learned High Court judge allowed the respondents claim and made an order in terms of the prayers as per the statement of claim dated 13 March 2006. The learned High Court judge held that:

> In the present case, there is no dispute that the defendants had been dealing with the forger in getting themselves registered as legal owners and in applying the deferred indefeasibility concept, I have no option but to hold that the title of the defendants to the property to be defeasible.

[7] However, it is also the finding of the High Court that the appellants were bona fide purchasers for value without notice.

[8] In dismissing the claim against the third party, the High Court judge held that:

> ... the third party owes no duty of care be it in tort or contract to the defendants. In tort, there is no relationship of proximity between the third party and the defendants. In contract, the defendants had no retainer with the third party. The only person who had relationship of proximity and a retainer with the defendants is DW2 and he is not a party to this suit, the court is prohibited from making any finding on that relationship.

PROCEEDINGS IN THE COURT OF APPEAL

[9] Aggrieved by the decision of the High Court, the appellant appealed to the Court of Appeal. In dismissing the appellants' appeal, the Court of Appeal made the following findings:

> However we would state at this juncture that the learned judge had applied the correct standard of proof in this case which is that on balance of probability it is for the respondents to prove their case which is grounded on forgery. This principle was stated in very clear terms by the then Supreme Court in *United Asian Bank Bhd v Tai*

Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, p 188. The learned judge was also correct in accepting the unchallenged evidence of the experts PW10 and PW11 called by the respondents to corroborate the direct evidence by the respondents that the respondents themselves did not sign the impugned power of attorney. On this issue the learned judge wrote in his judgment as follows:

> In my view there is direct evidence from the plaintiffs themselves that they did not sign the power of attorney which had been corroborated by the unchallenged evidence of the experts called by the plaintiffs in PW10 and PW11. It can be said that the expert reports had been quite unequivocal in stating that the plaintiffs did not sign the relevant documents. And when they are not challenged in any way by the defendants, the court though not bound by the opinions of the expert should accept the evidence unless cogent reasons are provided. Here no cogent reasons had been produced by the defendants; hence I have no hesitation in accepting the evidence of the experts.

We fully endorsed the above views by the learned judge.

[10] It is pertinent to note that although the Court of Appeal agreed with the learned High Court judge on the finding of facts that the power of attorney used as authority to transfer the land to the appellants was a forged instrument, it disagreed with the application of the concept of deferred indefeasibility to s 88 of the Sabah Land Ordinance ('SLO'). The Court of Appeal held:

> ... from the judgment of Edgar Joseph Jr FCJ in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* it is clear that there is no provision in the Sabah Law Ordinance conferring indefeasibility of title to or interests in land, though the importance of registration in passing valid title or interests to the registered owner is recognised under s 88 of the Ordinance.

[11] As regard the appellants' claim against the third party, the Court of Appeal agreed with the finding of the High Court and hence the appeal by the appellants was accordingly dismissed. This is not an issue before us.

THE ISSUES BEFORE THIS COURT

Question 1

Whether bona fide purchasers for value and without notice, obtained good title to land immediately upon registration of the transfer under s 88 of the land Ordinance (Sabah Cap 68) ('Land Ordinance') and is therefore an indefeasible registered interest in Land?

The appellants' submission

[12] Learned counsel for the appellants submitted that the appellants, as bona fide purchasers for value without notice, obtained good title to the land by way of registration under s 88 of the SLO. It follows therefore, by reasons of

registration of their interest in the land, the appellants had received an immediate indefeasible registered title in the land. By virtue of the registration of the appellants as the registered owners of the land, the respondents were divested of the title or ownership to the land.

[13] It was implored upon us that s 88 of the SLO should be interpreted according to the intention of Parliament, to ensure justice and fairness to the appellants. The appellants argued that s 88 in its plain meaning emphasises on the importance of registration as the pre-condition for validity of any new title or claim to or interest in any land. It constitutes the basic concept of Torrens system in which title to or interest in land vests and divests upon registration. In support, the appellants relied on *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12.

[14] On the effect of registration of the Torrens title, learned counsel for the appellants referred us to an Australian case of *Breskvar v Wall* [1971] HCA 70; 126 CLR 376 where Barwick CJ in delivering the judgment of the court observed: 'The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration ... It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.'

[15] Learned counsel for the appellants further submitted that the Malaysian courts recognize the concept of immediate indefeasibility to the title upon registration and thus, giving the true meaning of s 88 of the SLO and the spirit of Torrens system. He cited a High Court case of *Tan Sri William Cheng Heng Jem & Anor (suing as the President and Deputy President of the Associated Chinese Chambers of Commerce and Industry of Malaysia, and for and on its behalf) v Tan Sri Ngan Ching Wen & Ors* [2013] 8 MLJ 417 where it was held that: 'A primary registration of a first Torrens title upon alienation grants to the registered owner a title that is immediately indefeasible as expressly provided in s 92 of the NLC and s 88 of the SLO, and as judicially interpreted in the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, at 20A and 26B-E.' The court further held that: 'Hence in the case of the Sabah Land, the registration of the title in the Sabah Land in D8's name by the Sabah State Authority pursuant to the SLO under the relevant state leases vests conclusively in D8 the legal and beneficial ownership in the Sabah Land which is immediately indefeasible against the whole world.'

[16] It is further submitted that the rules of equity and good conscience offer the protection to the appellants being the bona fide purchasers for value without notice of their title against adversarial claim although the instrument

used to give effect to the transfer was forged. He relied on the case of *Ngui Yu Thau v Wong Mu Khyun & Ors* [2003] MLJU 106; [2003] 6 CLJ 273, where Richard Malanjum J (as His Lordship then was), observed that no one derives good title, right or interest from or through a forged instrument unless he satisfied the doctrine of bona fide purchasers for value and without notice. It is contended that in the present case it is proven that the appellants are bona fide purchasers for value without notice.

The respondents' submission

[17] For the respondents, it was contended that the SLO is not an absolute Torrens system but a modified Torrens system of land registration. The respondents submitted that s 88 of the SLO does not incorporate the principle of indefeasibility either immediate or deferred, of title or interests in land, on registration. On the contrary, such provision on indefeasibility of title is expressly defined under s 340 of the NLC of the National Land Code (NLC) and s 31 of the Sarawak Land Code. In support, the respondents referred to the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd*.

[18] It was further submitted that s 5 of the NLC defines purchaser as 'persons or body who in good faith and for valuable consideration acquires title to or any interest in land'. Further the proviso to s 340(3) of the NLC made special exception in regard to bona fide purchasers for value without notice. Both provisions are absent in the SLO. Thus, there is nothing under s 88 of the SLO to safeguard the interest of person who obtained title in good faith through a void instrument.

[19] The respondents contended that as the instrument to effect the transfer is void, it conveys no valid title or interest in the land to the appellants unless there is statutory intervention under the SLO like s 340(3) of the NLC. In support, learned counsel for the respondents referred this court to the passage by Gopal Sri Ram JCA (as His Lordship then was) in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62, which was also referred to by both the courts below which reads:

> ... it is axiomatic that a forged instrument is null and void and of no effect ... It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. (see p 85 of the judgment)

[20] The respondents also relied on the Federal Court's case in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269, where this court ruled:

> It was not in dispute that the two charges registered in favour of the third

respondent were based on void instrument as they were not executed by the appellant. It therefore followed that the two charges in this case were liable to be set aside under s 340(2)(b) since they were based on void instrument. As the third respondent was an immediate holder of these charges it could not take advantage of the proviso of s 340(3) of the NLC. The fact that the third respondent acquired the interest in question in good faith for value was not in issue because the charges arose from void instrument. It automatically followed that such charges were liable to be set aside at the instance of registered proprietor namely, the appellant.

[21] It was also the respondents' submission that the appellants' reliance on *Ngui Yu Thau v Wong Mu Khyun & Ors* was erroneous in the context of s 88 which does not provide for the concept of indefeasibility of title. If the appellants' argument is accepted, it would mean that any bona fide purchaser for value who gets his name registered on the land register cannot be removed for any reason whatsoever even if the registration was obtained through a forged instrument.

[22] Learned counsel for the respondents submitted that the concept of bona fide purchaser for value without notice only applies as an exception to the common law rule if the vendor has a defective title. In the present case, the vendor's title is not defective but the instrument of conveyance is defective. Thus, the respondents contended that the concept of bona fide purchaser for value without notice has no application in the present case. In support of his argument, learned counsel referred this court to the case of *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294.

[23] The respondents further submitted that even if the appellants were not involved in the act of forgery as claimed by the appellants, this will not in any way assist the appellants. The appellants, being the purchasers should have taken reasonable steps to make the necessary inquiry and to ensure that the instrument ie power of attorney, relied upon by the appellants is valid and genuine. Thus, the appellants have themselves to blame and to bear the consequences arising from their own negligence. In his submission, learned counsel for the respondents stated that this is consistent with the legal maxim 'caveat emptor ('let the buyer beware').

OUR FINDING

[24] In the present case it was a finding of fact by the High Court that the appellants were bona fide purchasers for value and without notice. It was also the finding by the High Court that the instrument used to effect the transfer of the said land was forged. These findings of fact by the High Court were never challenged in the Court of Appeal. Thus, the question arises whether, the appellants, being a bona fide purchasers for value and without notice can obtain a good title to the land upon registration under s 88 of the SLO

notwithstanding the fact that instrument of transfer was forged. It should be noted that the law governing the administration of land in Sabah is different from the law applicable in Peninsular Malaysia. In Peninsular Malaysia, the relevant law is the NLC.

[25] The concept of indefeasibility of title is incorporated in s 340 of the NLC. The section reads:

> Section 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible .
>
> (2) The title or interest of any such person or body shall not be indefeasible—
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) –
>
> (a) it shall be liable to be aside in the hands of any person or body to whom it may subsequently to be transferred; and
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> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.
>
> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[26] For better understanding of the concept of indefeasibility, the analytical framework of s 340 of the NLC is discussed in brief. Section 340 introduced the concept of indefeasibility of title following the Torrens system. Section 340(1) sets out the general principle that the proprietor in whose favour registration has been effected will obtain an indefeasible title to or interest in the land. In other words upon registration of a title, it confers an indefeasible title to the owner whose name is registered. It is a system that operates on the principle of 'title by registration'. By indefeasibility, it means, 'the immunity from attack by a dverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys' (see *Frazer v Walker* [1967] 1 All ER 649).

[27] The indefeasibility of title or interest so acquired under s 340(1), however, is liable to be set aside under s 340(2) where it has been obtained by, inter alia, fraud or forgery. Thus, based on the concept of conclusive proof of registration, anyone, including those who had successfully registered the land by unlawful means, their title could not also be defeated unless if it is shown that the transfer was tainted with fraud or forgery as provided in s 340(2). In the case of fraud, s 340(2)(a) provides for the title or interest obtained to be defeasible where the proprietor or his agent is a party or privy to the fraud. In the case of forgery, s 340(2)(b) provides for the title or interest so acquired by the proprietor or transferee immediately to the forgery to be defeasible and liable to be set aside. Thus, the title is subject to challenge and can be defeated although the proprietor or transferee acted in good faith in acquiring the title or interest. The section differentiates between title obtained through forgery or fraud. In the case of forgery, there is no requirement that the proprietor or transferee to be a party to the forgery but he must be a party or privy in the case of fraud.

[28] In the circumstances where the title or interest is subsequently transferred, s 340(3) provides that the subsequent proprietor or transferee will similarly obtained a defeasible title or interest. However, where the subsequent proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, the proviso to s 340(3) confers protection on such a subsequent proprietor or transferee such that his title or interest will be indefeasible. In effect, s 340 introduces what is called the concept of deferred indefeasibility (*Tan Ying Hong v Tan Sian San & Ors*).

[29] Section 88 of the SLO on the other hand does not incorporate the concept of indefeasibility of title as found in s 340 of the NLC. For ease of reference, s 88 of the SLO is reproduced below:

> Section 88
>
> No new title and no dealing with, claim to or interest in any land except, land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provision of this Part.

[30] From the plain reading of s 88 of the SLO, we find there exists a lacuna in this provision when compared with s 340 of the NLC which embodies the concept of indefeasibility of title. Registration under the SLO does not confer indefeasibility of title, deferred or immediate. We are of the view that in the absence of statutory intervention in the like of the proviso to s 340 (3), there is no protection afforded to the bona fide purchaser for value without notice such as the appellants in the present case. Therefore, with respect, we differ from the view expressed by Richard Malanjum J in *Ngui Yu Thau v Wong Mu Khyun & Ors*, at p 289 where he stated: 'Thus in Sabah with specific reference to land the principle as enunciated by the Federal Court in *Adorna Properties Sdn Bhd*

applies notwithstanding the lacuna in the Ordinance. In other words no one derives good title, right or interest from or through a forged instrument unless he satisfied the doctrine of bona fide purchaser for value and without notice'.

[31] We are of the view that s 88 of the SLO must be considered on its own without being unnecessarily influenced by the provisions of the NLC because they are poles apart. Section 88 of the SLO merely deals with the registration of new title, dealing with claim to or interest in any land, other than land held under native customary tenure without documentary title. It requires such title or dealing, etc to be registered for it to be valid under the SLO. In other words, it does not deal with the issue of defeasibility or indefeasibility of title as contained in s 340 of the NLC.

[32] The fact that the names of the appellants found their way on the register of title does not automatically confer on the appellants an indefeasible title. In other words, it is open to enquiry as to how the appellants got themselves registered as owners of the land. That was precisely what the courts below did in the present case and came to the conclusion that the appellants could not get valid title to the land on the ground that the power of attorney which was used as authority to transfer the land was a forgery. In its judgment the Court of Appeal stated: '... in this case that the power of attorney that was used as authority to transfer the said land to the appellants is a forgery, we agree with the learned trial judge that the title of the appellants to the property is defeasible and that the appellants could not have acquired a valid title to the said land though the land has been registered in the name of the appellants.'

[33] We agree with the finding of the courts below that the instrument of transfer in the present case was an invalid or void instrument of transfer as it was executed on the authority of a forged power of attorney, therefore, it could not give rise to a valid title in law and the SLO does not seek to give validity to such a title even though the appellants were bona fide purchasers for value without notice. There is nothing in the SLO giving protection to such purchasers. Such statutory protection must be expressly provided in the SLO (*Gibbs v Messer* [1891] AC 248).

[34] The above finding by the Court of Appeal found support in the common law rule of *Nemo Dat Quod Non Habet* (*nemo dat* rule in short). The *nemo dat* rule literally means 'no-one can transfer what he has not got' (*Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Limited* [1949] 1 KB 322 as per Denning LJ). This is sometimes called the 'derivation' principle: the transferee's rights derived from those of the transferor. The *nemo dat* rule protects the true owner of the goods (right of ownership) and the innocent purchaser who purchases the goods from non-owner gets no title as the non-owner could not pass good title because he has none. In other words,

the right of the true owner is retained in the event of his possession is being stolen or sold to the unsuspecting purchaser. In a typical case, the application of *nemo dat* rule involves the seller who does not own the goods has no right to sell them but nevertheless sells them to an innocent buyer. Because of the apparent harshness of the *nemo dat* rule (as it is an innocent buyer who is a bona fide purchaser for value without notice stands to lose out), several exceptions to *nemo dat* rule were developed at common law and also have been added by statute (Sale of Goods Act 1957). One of the exceptions to *nemo dat* rule is when the innocent purchaser pleads estoppel by asserting that the statement and conducts of the true owner have led him to believe that the unauthorised seller in fact had the right to sell the goods (s 27(1) of the Sale of Goods Act 1957).

[35] We are of the view that the *nemo dat* rule is equally applicable in the present case which involves the transfer of title under s 88 of the SLO (*M & J Frozen Food Sdn Bhd v Siland Sdn Bhd*). Applying the *nemo dat* rule to the present case, we hold that the forgers could not pass good title to the appellants (*Boonsom Boonyanit v Adorna Properties Sdn Bhd*). Thus, we conclude that a mere claim of being a bona fide purchaser for value without notice is not sufficient to avoid the application of the *nemo dat* rule which renders the appellants' title to the land liable to be set aside at the instance of the respondents who are the rightful owners.

[36] In the result, we affirm the finding of the Court of Appeal and the High Court that the appellants could not obtain a good title to the said land as it is defeasible and liable to be set aside on the ground that it was obtained under a void or invalid instrument of transfer. Thus, our answer to the first question is in the negative.

Question 2

Whether the concept of deferred indefeasibility as adopted in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269, which was a case based on s 340 of the National Land Code should be distinguished from the interpretation of s 88 of the Land Ordinance since there is no similar provision in the Land Ordinance?

[37] Having discussed s 340 of the NLC and s 88 of the SLO, it is clear that they are two distinct provisions. Section 88 of the SLO only makes provision in regard to registration of title. It does not incorporate the concept of indefeasibility as found under the NLC. In the present case, the appellants are the immediate holder of the title which was obtained by or under a forged instrument of transfer, therefore, their title is open to challenge and be set aside at the instance of the respondents who were the true owners. It is thus

erroneous to interpret s 88 of the SLO as to confer upon bona fide purchaser for value without notice an indefeasible title or interest in the land upon registration.

[38] For the reasons given, our answer to the second question is in affirmative.

CONCLUSION

[39] Based on the above, we agree with the High Court as affirmed by the Court of Appeal that appellants' title must in the circumstances be set aside. Accordingly, we dismiss the appeal with costs.

Appeal dismissed with cost and findings of the courts below affirmed.

Reported by Ashok Kumar